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No. 1282

In the Supreme Court of the United States

OCTOBER TERM, 1967

STANLEY DUANE BURDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App.) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1968. On March 18, 1968, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until April 1, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

298-655—68

QUESTIONS PRESENTED

1. Whether the trial court's finding that petitioner had not been entrapped is clearly erroneous.

2. Whether one who buys narcotics at the request of, and with funds supplied by, an undercover narcotics agent facilitates a sale of the narcotics within the meaning of 21 U.S.C. 174.

STATEMENT

Following a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted on both counts of a two-count indictment charging that he received, concealed, and facilitated the concealment and transportation of a nine-gram lot of heroin (count 1) and that he sold and facilitated the sale of the same (count 2), in violation of 21 U.S.C. 174 (1 R. 2–3; 2 R. 154–155). On September 28, 1965, he was sentenced to five years' imprisonment on each count, the terms to run concurrently (1 R. 15). The court of appeals affirmed (Pet. App.).

On January 25, 1965, an informant of the Federal Bureau of Narcotics called petitioner at his place of employment, said he wished to purchase a quarter-ounce or half-ounce of heroin, and asked petitioner if he could "make the buy" for him. Petitioner, who had bought and used heroin with the informant on several previous occasions, said that he would check with his "connection." Five minutes later petitioner returned the informant's call and told him that the "buy could be made." They arranged to meet at peti-

tioner's house at 8 o'clock that evening (2 R. 5–7, 17–18, 21–22, 30).

At 8 p.m., the informant and an undercover narcotics agent drove to petitioner's house in Van Nuys, California. The informant introduced the agent to petitioner as a friend who was also interested in buying heroin. Petitioner inquired how much they wished to "score" (buy) and the agent said a quarter-ounce each (2 R. 7–9, 34–35). Petitioner joined the two men in the car and, at petitioner's direction, the informant drove to Pasadena, California, and parked around the corner from the home of petitioner's "connection," one "Jay-Jay" (2 R. 9–10, 35–37). During the trip petitioner and the informant discussed narcotics and dealers in narcotics, and petitioner commented that "Jay-Jay" was the only person in the area with "the stuff" (2 R. 35, 49–50).

When they arrived at their destination, petitioner asked for the money and was given $120 (the then going price of two quarter-ounces of heroin)—$80 by the agent and the balance by the informant from funds which the agent had supplied him (2 R. 10, 28–29, 34, 37). Petitioner left the automobile and returned ten minutes later with two rubber condoms containing heroin. He kept one container and gave the other one to the informant, who transferred it to the agent (2 R. 10–12, 37, 43). When the agent put the container of heroin in his shirt pocket, petitioner told him to "[k]eep it handy, where you can swallow it in case we get stopped" (2 R. 37).

On the way back to Van Nuys, the agent complained to petitioner that the heroin which he had received seemed "a little short." Petitioner said he would give the agent more after they got back (2 R. 38–39). Upon their arrival at petitioner's house, petitioner administered a "fix" to himself from the heroin which he had retained and delivered the balance to the agent (2 R. 13–14, 39). This procedure was in accordance with a general understanding among addicts that one who makes a "buy" for another is entitled to a certain amount of the narcotics for himself (2 R. 13, 31–32). When the agent asked petitioner how he could get in touch with him if he wanted to buy "more stuff," petitioner gave the agent a card with his name and telephone number on it and said that the agent could contact him at that number whenever he wished to buy more heroin (2 R. 39–40). The agent called petitioner several times thereafter and asked him to make additional purchases of heroin for him, but petitioner declined, saying that he had heard that the informant was "working with the police" (2 R. 52–54).

When petitioner was arrested, he stated that he had never "sold" but had only "transferred" narcotics to the agent (2 R. 64–65). In his testimony at trial, petitioner admitted the substance of the transactions testified to by the government witnesses, but claimed that he had been entrapped (2 R. 99–126).

ARGUMENT

1. The trial court's finding that petitioner had not been entrapped is supported by substantial evidence,

as discussed above, and is not clearly erroneous. Entrapment involves more than affording the accused the opportunities or facilities for the commission of crime. *Sorrells* v. *United States,* 287 U.S. 435, 441; *Sherman* v. *United States,* 356 U.S. 369, 372; *Lopez* v. *United States,* 373 U.S. 427, 434–437. Making such opportunities available is "frequently essential to the enforcement of the law" (*Sorrells* v. *United States, supra,* 287 U.S. at 441) and is "a far cry from entrapment" (*Osborn* v. *United States,* 385 U.S. 323, 331–332). Here there was no luring or importuning in the face of manifested reluctance. Petitioner readily agreed to make the requested purchase of heroin from his "connection," and when the informant brought along a "friend" with a similar interest, petitioner promptly agreed to accommodate him also. Petitioner compensated himself for his services by taking a portion of the purchase for his own use, and left his name and number with the friend in the event that the latter should desire his services again. These facts do not suggest entrapment.

2. As middleman between his "connection" and the persons on whose behalf he effected the purchase, petitioner clearly "facilitated" a sale of heroin within the meaning of 21 U.S.C. 174, even if he was not technically a seller or buyer himself. *United States* v. *Simons,* 374 F. 2d 993, 995 (C.A. 7), certiorari denied, 386 U.S. 1025; *Lewis* v. *United States,* 337 F. 2d 541, 544–545 (C.A.D.C.), certiorari denied, 381 U.S. 920; *Jasso* v. *United States,* 290 F. 2d 671, 673 (C.A. 5), certiorari denied, 368 U.S. 858; *Willis* v. *United States,* 285 F. 2d 663, 665 (C.A.D.C.); *Rios* v. *United*

States, 283 F. 2d 134, 136–137 (C.A. 9); *Bruno* v. *United States*, 259 F. 2d 8, 10 (C.A. 9).[1] And it is immaterial that the persons at whose instance he acted were engaged in the gathering of evidence. *United States* v. *Simons*, *supra*, 374 F. 2d at 995; *Lewis* v. *United States*, *supra*, 337 F. 2d at 544–545.[2] In all

[1] Petitioner's reliance (Pet. 13) on *United States* v. *Moses*, 220 F. 2d 166 (C.A. 3), *United States* v. *Sawyer*, 210 F. 2d 169 (C.A. 3), and *Adams* v. *United States*, 220 F. 2d 297 (C.A. 5), is misplaced. None of those cases involved the charge of facilitating a sale. The defendant in *Moses*, who had done no more than introduce the purchasers to the seller of the narcotics and vouch for their *bona fides*, was charged as an aider and abettor of the sale, under a statute which contained no "facilitation" provision. *Sawyer* and *Adams* involved defendants who, like petitioner, had acted as procuring agents for purchasers of narcotics, but the charge in each case apparently was solely the sale of the contraband. In *United States* v. *Prince*, 264 F. 2d 850, 853 (C.A. 3), also cited at Pet. 13, the court applied the rule of the *Sawyer* and *Adams* decisions—without explanation—to a conviction under a charge of facilitating a sale. The soundness of the *Prince* holding is open to question since, as was noted in *Vasquez* v. *United States*, 290 F. 2d 897, 899 (C.A. 9), the opinion "contains no statement of the rationale upon which the court's decision on this point was based" and "cited cases which dealt only with sale."

[2] The suggestion to the contrary in *Henderson* v. *United States*, 261 F. 2d 909, 912 (C.A. 5), cited at Pet. 13, 14–15, was an alternative ground of reversal. The primary ground was that entrapment had been shown as a matter of law. The *Henderson* decision is in any event clearly distinguishable from this case in that the defendant there in no way profited from the purchases of narcotics, which she made in the belief that she was alleviating the distress of a friend. Petitioner, on the contrary, did profit from the sale by appropriating a portion of the narcotics for his own use.

events, even if petitioner's conviction on the charge of facilitating a sale was vulnerable, his conviction on count one—charging that he received, concealed, and facilitated the transportation of the heroin—was certainly valid. See *Vasquez* v. *United States*, 290 F. 2d 897, 899 (C.A. 9). That conviction is suffieient to sustain the judgment since the sentences imposed on the two counts run concurrently. *United States* v. *Romano*, 382 U.S. 136, 138; *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.[3]

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[3] Pointing out that the narcotics must have been unlawfully imported and that the defendant must have had knowledge of that fact, in order to support a conviction under 21 U.S.C. 174, petitioner argues that the evidence was deficient because there was no proof of either of those elements (Pet. 3, 9–10, 12–13). As petitioner recognizes, however, Section 174 provides that proof of possession of the narcotics is sufficient to support a conviction unless the possession is explained to the jury's satisfaction. The validity of this presumption was sustained in *Yee Hem* v. *United States*, 268 U.S. 178, against the charge—here renewed by petitioner (Pet. 5–6, 10–11)—that the presumption violates the privilege against self-incrimination by requiring the defendant to testify in order to rebut it (at 185). See also *Harris* v. *United States*, 359 U.S. 19, 23; *Roviaro* v. *United States*, 353 U.S. 53, 63. Since the government's evidence clearly established that petitioner had had possession of the heroin (petitioner, indeed, acknowledged the fact in his testimony), the presumption was fully operative, and nothing to which petitioner testified tended in any way to rebut it.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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